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No. 14-981

In the

# Supreme Court of the United States

ABIGAIL NOEL FISHER,

*Petitioner.*

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## *AMICUS CURIAE* BRIEF OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

1. Should this Court reconsider its holding in *Grutter v. Bollinger*, 539 U.S. 306 (2003), that authorized state universities to use racially discriminatory admissions procedures, ostensibly for a period of 25 years?

2. When reviewing state classifications based on race, may a Circuit Court uphold the racially discriminatory law by reliance on evidence outside the record and developed long after the state adopted the program?

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## IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Center for Constitutional Jurisprudence[1] is a project of the Claremont Institute, a nonprofit organization whose mission is to restore and uphold the principles of the American Founding. Among these principles is the self-evident truth that all men are created equal. The Declaration of Independence gives precedence to this principle—establishing it as the core truth of the new republic. This principle, also codified in the Constitution of the United States, guarantees to every individual the right to the equal protection of the law, regardless of his or her race.

In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance touching on equality, including *Ricci v. DeStefano*, 557 U.S. 557 (2009), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Adarand Constructors v. Mineta*, 534 U.S. 103 (2001).

## SUMMARY OF ARGUMENT

This Court should grant review in this action to reexamine its holding in *Grutter v. Bollinger*. The state's classification of American citizens by race is

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[1] Pursuant to this Court's Rule 37.2, all parties have filed blanket consents to amicus participation with the clerk. Amicus gave notice to all parties of this brief more than 10 days prior to filing.

Pursuant to Rule 37.6, Amicus Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

fundamentally at odds with the equality principle of the Declaration of Independence, the "principle of inherent equality that underlies and infuses our Constitution." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

The Circuit Court's unique application of "strict scrutiny" also justifies review by this Court. The lower court's rewriting of the strict scrutiny standard fundamentally alters how courts apply that test. The court below made these alterations without discussing its new approach or explaining in what context it should apply. The decision creates confusion in the law and requires this Court's intervention to confirm whether the radical changes to strict scrutiny review are to be used by federal courts to evaluate presumptively unconstitutional state laws.

## ARGUMENT

### I. Permitting Racial Discrimination In Order To Promote Diversity Violates the Equality Principle Underlying the Constitution.

The fundamental creed upon which this nation was founded is that "all men are created equal." DECLARATION OF INDEPENDENCE ¶ 2. This principle is, in Abraham Lincoln's words, a "great truth, applicable to all men at all times." Letter from Abraham Lincoln to H. L. Pierce (Apr. 6, 1859), reprinted in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 374, 376 (R. Basler ed. 1953). "All men" meant all human beings—men as well as women, black as well as white. *See, e.g.*, James Otis, Rights of the British Colonies Asserted and Proved ("The colonists are by the law of nature freeborn, as indeed all men are, white or black"),

reprinted in PAMPHLETS OF THE AMERICAN REVOLUTION 439 (B. Bailyn, ed. 1965); *id.* ("Are not women born as free as men? Would it not be infamous to assert that the ladies are all slaves by nature?").

These sentiments were codified in the first State constitutions established after the American colonies declared their independence. The Virginia Declaration of Rights, for example, provided that "all men are by nature equally free and independent." Va. Dec. of Rights § 1 (1776), reprinted in 1 THE FOUNDERS' CONSTITUTION 6 (P. Kurland & R. Lerner, eds., 1987). And the Massachusetts Declaration of Rights stated simply, "All men are born free and equal[.]" Mass. Dec. of Rights (1780), reprinted in 1 THE FOUNDERS' CONSTITUTION at 11.

Even those founders who owned slaves recognized that slavery was inconsistent with the principle of equality articulated in the Declaration of Independence. "The mass of mankind has not been born with saddles upon their backs," wrote Thomas Jefferson, "nor a favored few, booted and spurred, ready to ride them legitimately, by the grace of God." Letter to Roger C. Weightman (June 24, 1826), reprinted in JEFFERSON: WRITINGS 1516, 1517 (M. Peterson, ed., 1984). This was true, according to Jefferson, even if people were not of equal capabilities. "[W]hatever be their degree of talent it is no measure of their rights," wrote Jefferson shortly before the end of his second term as President. "Because Sir Isaac Newton was superior to others in understanding, he was not therefore lord of the person or property of others." Letter from Jefferson to Henri Gregoire (Feb. 25, 1809), in *id.*, at 1202.

The Founders regularly exhibited an understanding of equality that is strikingly similar to what we today refer to as equality of opportunity, not equality of result.[2] Indeed, James Madison described the "protection of different and unequal faculties" as "the first object of government." The Federalist No. 10, p. 78 (Rossiter ed. 1961) (J. Madison). Alexander Hamilton agreed, writing that "[t]here are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. The door ought to be equally open to all." The Federalist No. 36, p. 217 (A. Hamilton) (emphasis added).

With the eradication of slavery and the passage of the Fourteenth Amendment, the promise of legal equality was opened to all. Unfortunately, in *Plessy v. Ferguson*, 3 U.S. 537 (1896), this Court, in one of its darkest moments, held that legal mandates separating Americans by race were acceptable under the Constitution. Alone in dissent, Justice John Marshall Harlan eloquently penned the judicial equivalent of the Declaration's creed:

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are

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[2] The distinction can probably be traced to President Lyndon Johnson's speech at Howard University on June 4, 1965: "It is not enough just to open the gates of opportunity.... We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result." Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights, in 2 PUBLIC PAPERS OF THE PRESIDENTS 1965, at 635, 636 (1966).

> equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

*Id.* at 559 (Harlan, J., dissenting).

Fifty-eight years later, in *Brown v. Board of Education* and its progeny, this Court repudiated *Plessy's* separate but equal doctrine. Thurgood Marshall, as the lawyer for the challengers in *Brown*, argued: "When the distinctions imposed are based upon race and color alone, the state's action is patently the epitome of that arbitrariness and capriciousness constitutionally impermissive under our system of government." Brief for Appellants at 6, *Brown v. Board of Education*, 347 U.S. 483 (1954) (1952 WL 47265) (citing *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); *Skinner v. Oklahoma*, 316 U. S. 535 (1942)). The Court ultimately renewed America's dedication to what Martin Luther King would later describe as his dream, "that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident: that all men are created equal.'" Martin Luther King, Jr., "I Have A Dream" (1963), reprinted in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 217, 219 (James Washington ed. 1986).

The evils of racial discrimination are not lessened because they are allegedly created to benefit previously excluded groups. After the Civil War, new racist laws, such as Black Codes and Jim Crow laws, were created in order to keep newly freed slaves from voting, earning a living, or owning property. However,

the paternalism of "benign" whites limited the freedom of blacks in many ways, too. The former slave Frederick Douglass addressed this problem when he wrote, "in regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested toward us. What I ask for the Negro is not benevolence, not pity, not sympathy, but simply justice." Frederick Douglass, What The Black Man Wants (Jan. 26, 1865), reprinted in 4 FREDERICK DOUGLASS PAPERS 59, 68-69 (Blassingame & McKivigan, eds. 1991). Douglass continued:

> Everybody has asked the question ... "What shall we do with the Negro?" I have had but one answer from the beginning. Do nothing with us! ... All I ask is, give him a chance to stand on his own legs! ... If you will only untie his hands, and give him a chance, I think he will live.

*Id.*

Douglass understood that paternalistic programs such as the one at issue here "constitute badges of slavery and servitude." *Civil Rights Cases*, 109 U.S. 3, 36 (1882) (Harlan, J., dissenting). They are akin to legislation that once blocked women from entering a variety of professions, which was "apparently designed to benefit or protect women [but] could often, perversely, have the opposite effect." Ruth Bader Ginsburg, *Constitutional Adjudication in the United States As A Means of Advancing The Equal Statute of Men And Women Under The Law*, 26 HOFSTRA L. REV. 263, 269 (Winter, 1997); *cf. Muller v. Oregon*, 208 U.S. 412 (1908). Such legislation was "ostensibly to shield or favor the sex regarded as fairer but weaker, and dependent-prone," Ginsburg, at 269, but was in fact

"premised on the notion that women could not cope with the world beyond hearth and home without a father, husband, or big brother to guide them." *Id.*, at 270.

In exactly the same way, racial preferences, whether in hiring or contracting, the provision of government benefits, or, as here, university admissions, are ostensibly designed to shield minority group members, but in fact are premised on the notion that they are incapable of competing without a big brother—a white big brother—to guide them.[3]

As Justice Douglas wrote, "A [person] who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting); *see also Regents of Univ. of California v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Justice Powell) ("there is a measure of inequity in forcing innocent persons in [Bakke's] position to bear the burdens of redressing grievances not of their making"); *id.*, at 290 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color").

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[3] Unfortunately, the results of such "benign" discrimination have often been just as bad for their alleged beneficiaries as were the ills which gave rise to such programs. *See, e.g.*, Thomas Sowell, THE ECONOMICS AND POLITICS OF RACE 200 (1983) (illustrating "counterproductive trends" caused by "beneficial" discrimination).

Unfortunately, experience has shown that racism is not overcome easily, whether it be in segregated schools or in legal classifications like the racial preference program at issue here. This Court spent more than two decades fighting such classifications after the *Brown I* case. *See Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218 (1964); *Green v. Cnty. Sch. Bd. of New Kent Cnty., Va.*, 391 U.S. 430 (1968); *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) ("*Brown II*"); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526 (1979). Since then, America has made remarkable progress. Today, Americans generally believe that race is an illegitimate factor for government classification. Across the country, Americans have rejected the notion of racial classifications, including supposedly "benign" ones. *See* Clint Bolick, *Blacks and Whites on Common Ground*, 10 STAN. L. & POL'Y REV 155, 158 (Spring 1999); Terry Eastland, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE 164-165 (2d ed. 1997). States have begun to incorporate Justice Harlan's *Plessy* dissent into law. *See* Cal. Const. art. I, 31, cl. A (1996) (Proposition 209); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000) (noting that Proposition 209 "adopt[s] the original construction of the Civil Rights Act"); Wash. Rev. Code Ann. § 49.60.400(1) (Washington Initiative 200). Indeed, the people of Michigan adopted just such a measure in response to this Court's ruling in *Grutter*—a decision that was upheld by this Court last year in *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1638 (2014) (Kennedy, J., plurality opinion); *id.*, at 1640 (Scalia, J., joined by Thomas, J., concurring in

judgment); *id.*, at 1648 (Breyer, J. concurring in judgment).

Yet today, defenders of racially discriminatory laws, as emphatically as their predecessors in the 1950s, are exhibiting the same determination to avoid the commands of the Equal Protection Clause. Reliance upon this Court's ruling in *Grutter* to rationalize racial classifications that violate the fundamental commands of Equal Protection should be no more permissible than the long and sordid reliance on *Plessy v. Ferguson* to rationalize "separate but equal" segregation and its scheme of racial classifications.

The time for government to cease treating individuals on the basis of their skin color rather than their merit is long overdue. As this Court held in *Croson*, any discrimination on the basis of race must cease, except (perhaps) as a remedy for government's own prior or continuing discrimination on the basis of race. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989); *see also Adarand*, 515 U.S., at 239 (Scalia, J., concurring in part and concurring in the judgment) ("Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus on the individual"). "The time for mere 'deliberate speed' [to fully enforce this principle] has run out." *Griffin*, 377 U.S. at 234; *see also Green*, 391 U.S., at 438; *cf. Brown II*, 349 U.S. at 301 (ordering that assignment of pupils to schools based on race be ended "with all deliberate speed").

Experience has shown that racial discrimination is not easily eradicated. Professor Lino Graglia has noted the "intense resistance that can be expected

from academics and the educational bureaucracy" in eliminating racial preferences. Despite California's state laws prohibiting such preferences, for instance, "the Governor and the Board of Regents . . . encountered the recalcitrance, not to say insubordination, of the President of the University System who [sought] to delay implementation of [a racially- neutral admissions policy] as long as possible." Lino Graglia, *"Affirmative Action," Past, Present, And Future*, 22 OHIO N.U.L. REV 1207, 1219 (1996). The federal government's response to this Court's decision in *Adarand Constructors* paralleled California's experience. As one commentator noted, despite *Adarand*'s holding, awards to racially-preferenced contractors actually increased in the years following the decision. No honest attempt was made to end the preference scheme—instead, those who defended racially discriminatory laws sought "to marginalize *Adarand*'s holdings by tinkering with the operation of set-aside programs, but by no means calling for their termination." R. Brad Malone, *Note: Marginalizing Adarand : Political Inertia and the SBA 8(A) Program*, 5 TEX. WESLEYAN L. REV 275, 298-299 (Spring 1999).

Only by insisting, as the post-*Brown* Court did, that racial discrimination is no longer tolerable, can this Court end racial classifications in the law once and for all.

It is also time to realize that the principles of the Declaration, codified at long last in the Constitution via the Fourteenth Amendment, will not countenance racial discrimination that purports to remedy past wrongs against individuals of one race by conferring benefits upon others who happen to share the same skin color, at the expense of those who do not. As Dr.

King also noted that August day more than a half century ago on the steps of the Lincoln Memorial, "In the process of gaining our rightful place [as beneficiaries of the Declaration's promise of equality,] we must not be guilty of wrongful deeds." King, *I Have A Dream*, in Washington, supra at 218. In short, "there has been entirely too much deliberation and not enough speed in enforcing the constitutional rights" of everyone—including the Petitioners in these cases—to be treated without regard to the color of their skin. *Green*, 391 U.S. at 229. It is now for this Court to say, as it said in *Green*, this recalcitrance is unacceptable and that legal categorization by race must end "now." *Id.* at 439.

It is time to return to these principles. The Court can take a step in that direction by reconsidering its decision in *Grutter*.

## II. The Lower Court's Radical Change to Strict Scrutiny Review Also Requires Review.

In *Fisher I*, this Court remanded the case to the Fifth Circuit with instructions to review the University's program under strict scrutiny. *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2421-22 (2013) (*Fisher I*). The scrutiny applied by the court below, however, differs from the traditional strict scrutiny this Court has described in cases challenging state racial classifications. In a radical departure from that traditional analysis, the lower court permitted the University to posit a new reason for the adoption of the racial classifications. In so doing, the scrutiny applied by the Fifth Circuit more closely resembles rational basis rather than strict scrutiny.

There is no doubt about the university's original basis for adopting the race conscious admissions. This Court noted that the university adopted its race-preference policy in 2004, and that the policy was formally described in a document entitled "Proposal to Consider Race and Ethnicity in Admissions." *Fisher I*, 133 S. Ct., at 2416. The educational benefits from diversity that the university described in that document derived from the numbers of minority students in each class—a simple quantitative goal. *Id.*; The University of Texas at Austin, Proposal to Consider Race and Ethnicity in Admissions 25 (June 25, 2004) ("Proposal"), available at http://www.utexas.edu/student/admissions/about/admission_proposal.pdf. The report emphasized the need for "classroom contact with peers of differing racial, ethnic, and cultural backgrounds." Proposal at 25. Thus, the university described its proposal as seeking a "critical mass" of minority students in the classroom. *Id.* Emphasizing the quantitative nature of the diversity goal, the Proposal set out charts showing raw numbers of students in classes of 5 to 24 total students, highlighting the number of classes with no minority students. *Id.* at 26. This university policy adopted in 2004—the policy at issue in this case—focused solely on increasing the number of minority students enrolled.

On remand following this Court's holding that traditional strict scrutiny must be applied, the university shifted its argument from a pure quantitative goal (which was being met by the Top Ten Percent Plan). Pet. App. 40a. Instead of the "critical mass" quantitative goal, the University now argues it is pursuing a "qualitative" goal; that the Top Ten Percent Plan admits too many minorities that attended high schools with a high percentage of minority students but lower

academic credentials. Pet. App. 32a-39a. Therefore, according to this new argument, the University needs the "holistic" race-based admissions system to ensure that it is selecting the right minority students.

Whatever the merits of the University's argument, its case before the court below was now premised on an entirely new justification for its race-based admission process on remand. The Fifth Circuit permitted this shift in argument. Pet. App. 39a. The lower court further departed from traditional strict scrutiny by allowing the University to use evidence outside the record to support the newly minted claim. *See* Pet. App. 32a-39a. This represents a radical change in the way strict scrutiny had been applied in other cases.

The decisions of this Court establish that strict scrutiny requires the court to focus its analysis on the actual justification for the program originally advanced by the lawmaking body. As this Court noted in *Shaw v. Hunt*, "a racial classification cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the legislature. 517 U.S. 899, 908 n. 4 (1996). Rather, "[t] o be compelling, the State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification." *Id.*. The reason for this approach is that racial classifications are presumptively unconstitutional. *Adarand*, 515 U.S., at 227. Focusing the judicial inquiry on the actual basis identified by the governmental agency for the racial classification allows the court to "smoke out" illegitimate uses of race. *Croson*, 488 U.S., at 493. Even in gender classification cases, in which a less stringent form of heightened scrutiny has been applied, this Court has ruled that

the justification for the classification cannot be "invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Rational basis, by contrast, requires the court to look at any possible justification for the policy. This Court has explained the difference in terms of the constitutional presumption at play: "[B]ecause [a] classification [subject to rational basis review] is presumed constitutional, the 'burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" *Armour v. City of Indianapolis*, 132 S.Ct. 2073, 2080-81 (2012). Thus, when defending such classifications, the government does not even need to have articulated a reason when adopting the classification, as long as there is a conceivable basis for it. *Heller v. Doe by Doe*, 509 U.S. 312, 319-21 (1993). "[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993).

The court below did not limit its examination to the actual basis articulated by the University when it adopted the program. Instead, the court permitted the University to posit a conceivable new basis for the plan and to support that basis by new evidence outside the record of the case. This type of review is a radical departure from this Court's cases on strict scrutiny. By permitting the University to propose a new basis for its program, the lower court shifted the burden. Ms. Fisher in this case now had the burden "to negative" not only the announced basis for the University's race-conscious admissions program, but also

any conceivable basis the University may raise on appeal. The "strict scrutiny" applied by the Fifth Circuit in this case appears more like rational basis review. Review by this Court is necessary to settle whether this dramatic departure from precedent is to be the norm when federal courts review presumptively unconstitutional state laws.

## CONCLUSION

In the marble above the grand entrance to this Court are chiseled the words, "EQUAL JUSTICE UNDER LAW." The Court should reaffirm this principle by holding that legally dividing Americans by race is unconstitutional under any circumstances. It should embrace the doctrine of complete racial equality, and stand "for what is best in the American dream and for the most sacred values in our Judeo- Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence." Martin Luther King, Jr., Letter from Birmingham Jail, reprinted in WHY WE CAN'T WAIT 99 (Harper & Row 1964).

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